These provisions reflect the signatories' judgment that "[d]etained foreign nationals are inevitably distressed by the prospect of securing and preserving their rights in a legal system with whose institutions and rules they are not familiar." Luke Lee, *Consular Law and Practice* 145 (2d ed. 1991) (quoting U.S. Dep't. of State, Telegram 40298 to Embassy Damascus, Feb. 21, 1975). For example, United States nationals detained abroad may not understand the function of magistrates, who play a much greater role in criminal prosecutions than do judicial officers in the Unites States.[3]

Conversely, detained foreign nationals may find many aspects of the U.S. criminal justice system deeply puzzling. Foreign nationals may not understand the importance of statements given during police interrogations.[4] They also may not understand the function of a public defender or appointed attorney, who represents the client's interests despite being paid by the state. *See Polk County* v. *Dodson*, 454 U.S. 312, 322 (1981). Therefore, they may not meaningfully apprehend the promise of the *Miranda* statement that an attorney will be appointed for a defendant who cannot afford representation. Likewise, they may not understand the central role of plea-bargaining in the U.S. criminal justice system, including the fact that a guilty plea establishes the defendant's guilt just as definitively as a guilty verdict at trial. *See Bradshaw* v. *Stumpf*, 125 S. Ct. 2398, 2405-2407 (1995). And if a foreign national is convicted, it may be ex-

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[3] *See, e.g.*, Renée Lettow Lerner, *The Intersection of Two Systems: An American on Trial For an American Murder in the French Cour D'Assises*, 2001 U. Ill. L. Rev. 791, 800-806; *see generally* Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. Pa. L. Rev. 506 (1973) (contrasting the Anglo-American adversarial system with the inquisitorial system).

[4] As *amicus* Mexico notes (Br. 10-11), under the laws of some other nations, statements given to the police outside the presence of a magistrate or public prosecutor are not admissible against the defendant at trial. A citizen of such a nation who was detained in the United States might be surprised to discover that his statement to the police may well serve as a crucial piece of evidence against him in a criminal case.

ceptionally difficult for him to understand the process of pursuing an appeal, including whether he needs to obtain new counsel. *Cf. Halbert* v. *Michigan*, 125 S. Ct. 2582, 2592-2593 (2005).

Consular officials can help detained foreign nationals navigate the waters of the criminal justice system and thereby help them secure their rights within that system. Of particular importance is the consulate's ability to help locate culturally sensitive counsel who can translate unfamiliar aspects of the receiving state's criminal justice system to the detained individual. Consular officers also can communicate with the prosecuting authorities, perhaps presenting reasons not to seek the death penalty in capital cases. The consulate can help identify and locate evidence that is in the home country and inaccessible to the detained foreign national's lawyer. Such evidence may include exculpatory evidence or mitigating evidence for use in capital cases (*e.g.*, school records or other evidence about the defendant's early experiences of the kind frequently introduced in capital cases). Finally, consular officials may monitor proceedings to ensure compliance with international standards; indeed, many countries publish specific guidelines for such monitoring.[5]

The importance of these kinds of consular assistance should not be underestimated. The State Department has repeatedly recognized the "essential function" of the Vienna Convention in protections nationals who travel to foreign countries. 7 *Foreign Affairs Manual* § 411 (1984), *available at* http://foia.state.gov/REGS/fams.asp?level=2&id=8&fam=0. The Department explained:

> One of the basic functions of a consular officer is to provide a "cultural bridge" between the host community and the officer's own compatriots traveling

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[5] For example, the State Department's guidelines state that its consular officials must attend trials, protest discrimination, and monitor the well-being of the individual incarcerated. *Consular Law and Practice* 125.

> or residing abroad. No one needs a cultural bridge more than the individual U.S. citizen who has been arrested in a foreign country or imprisoned in a foreign jail.

Id. § 401; *see also id.* §§ 400-426.2-1 (2004) (recognizing the role of the consulate in aiding the national unfamiliar with the foreign legal system).

B. Reciprocity, Comity, And Uniform Treaty Interpretation Principles Counsel In Favor Of Adhering To The ICJ's Interpretation Of The Vienna Convention

The U.S. government has argued, to both the ICJ and this Court, that Article 36 of the Convention does not create or secure individual rights, and that a violation of that Article's consular notification provision may not be remedied in the criminal justice system but only through state-to-state adjustment, such as a formal apology.[6] Whatever the merits of these submissions may have been before the *Avena* ruling, they come to this Court in a decidedly different posture now. In *Avena*, the ICJ fully examined and then rejected those contentions. After extensively examining the text and purpose of Article 36, the ICJ concluded that that Article does indeed create "individual rights," and that the detaining state must permit a criminal conviction to be judicially re-examined, where a violation of a detained foreign national's right to consular notification under that Article may have prejudiced him in a criminal prosecution, resulting in "severe penalties." *See Avena*, ¶¶ 139-143.

Reciprocity, comity, and uniformity, which form the underpinnings of international law, favor adherence to the

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[6] *See* Counter-Memorial of The United States of America 74-78, *Case Concerning Avena and Other Mexican Nationals* (*Mex.* v. *U.S.*), (Nov. 3, 2003), *available at* http://www.icj-cij.org/icjwww/idocket/imus/imusframe.htm; Brief for the United States as *Amicus Curiae* 33-38, *Medellin* v. *Dretke*, 125 S. Ct. 2088 (2005) (*per curiam*) (No. 04-5928); *see also Medellin*, 125 S. Ct. at 2104-2105 (O'Connor, J., dissenting).

ICJ's interpretation of the Convention in *Avena*. To reach that conclusion, this Court need not decide that, strictly speaking, either the United States as a general matter or this Court in particular is "bound" by the ICJ's construction of that treaty in cases, such as these, that do not involve the specific individuals at issue in *Avena*. Nor need this Court conclude that the ICJ's reading of the Convention is the only possible correct one. Rather, it is sufficient to observe that the ICJ's decision is entitled to great weight because it is fully consistent with the principles underlying Article 36 in particular and the Convention in general, and it enjoys broad support in the international community—as demonstrated by the significant level of support shown for that decision in *amicus curiae* briefs in this Court.

1. The Vienna Convention—like all treaties—rests on the fundamental norm of reciprocity. This principle lies at the heart of international law and international relations. As this Court has long acknowledged, "international law obligations are of necessity reciprocal in nature." *United States* v. *Arjona*, 120 U.S. 479, 487 (1887); *see also Hilton* v. *Guyot*, 159 U.S. 113, 228 (1895) ("[I]nternational law is founded upon mutuality and reciprocity . . . ."). The heart of this reciprocity principle is the idea that "what is law for one is, under the same circumstances, law for the other." *Arjona*, 140 U.S. at 487. This principle strongly suggests that, where, as here, numerous other parties to the Convention understand a particular practice to be essential to full compliance with the Convention, the United States should adopt that understanding as well. Where "postratification understanding" of other contracting parties supports one reading of a treaty over another, that understanding is to be preferred. *See Zicherman* v. *Korean Air Lines Co.*, 516 U.S. 217, 226 (1996).

Reciprocity is a particularly important principle in a multilateral treaty, such as the Convention, that protects the interests of individuals. Millions of American citizens live and travel around the world secure in the belief that agents of their government will be available to assist them in the

event they are detained abroad. They enjoy such security precisely because other nations trust the United States to comply with its treaty obligations in turn and to afford the same protections to their citizens who visit the United States. Should any nation that is a party to the Convention consistently fail to comply with its obligations under that treaty, the mutual trust and sense of obligation underpinning the Convention could unravel.

For its part, the United States has consistently sought to strengthen the protections offered by the Vienna Convention. In cases before the ICJ and elsewhere, the United States has emphasized the vital importance of the safeguards that the Convention offers United States citizens detained by another signatory to the Convention. Thus, when Iran seized the United States embassy and detained embassy personnel, the United States argued to the ICJ in the *Diplomatic and Consular Staff* case that "a principal function of the consular officer is to provide varying kinds of assistance to nationals of the sending State, and for this reason, the channel of communication between consular officers and nationals must at all times remain open." Memorial of the United States, *Case Concerning United States Diplomatic and Consular Staff in Tehran*, (*U.S.* v. *Iran*), 1980 I.C.J. Pleadings 174 (Jan. 12).

The United States has assertively challenged other governments that fail to provide consular rights to detained American citizens. When Syria detained two United States citizens, the State Department used the Convention to gain access to these individuals. *See* William J. Aceves, *The Vienna Convention on Consular Relations: A Study of Rights, Wrongs, and Remedies*, 31 Vand. J. Transnat'l L. 257, 271 (1998). The United States complained of the violation of the Vienna Convention, stating: "The right of governments, through their consular officials, to be informed promptly of the detention of their nationals in foreign states, and to be allowed prompt access to those nationals, is well established in the practice of civilized nations." *Consular Law and Practice* 145. In so doing, it stressed "considerations of re-

ciprocity" and the fact that the United States would certainly abide by its obligations in the reverse scenario. *Id.*[7]

But the United States has also recognized that its concern for protecting the rights of Americans abroad requires it to have a federal policy of attentive support for consular rights domestically. As the State Department has explained to state and local law enforcement agencies:

> The Department of State appreciates the continued cooperation of federal, state, and local law enforcement agencies in helping to ensure that foreign nationals in the United States are treated in accordance with these instructions. Such treatment will permit the United States to comply with its consular legal obligations domestically and to continue to expect rigorous compliance by foreign governments with respect to United States citizens abroad.[8]

2. Closely connected to the reciprocity principle is the principle of comity. Comity has been aptly described as "a principle under which judicial decisions reflect the systemic value of reciprocal tolerance and goodwill." *See Société Nationale Industrielle Aerospatiale* v. *United States Dist. Ct.*, 482 U.S. 522, 555 (1987) (Blackmun, J., concurring in part and dissenting in part). Comity favors an approach that "furthers, rather than impedes, the development of an ordered international system. A functioning system for solving disputes across borders serves many values, among

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[7] In one case, the United States complained about a Vienna Convention violation—the detention of two Americans for 32 hours—even after the individuals were released. *Consular Law and Practice* 145, 149. The United States' commitment to protecting its citizens' right to consular notification and access is sufficiently deep that the State Department as a matter of policy and procedure requires local consular officials to protest if they learn of an American citizen who is detained without consular notification for more than 72 hours. *See* 7 *Foreign Affairs Manual* § 426.2-1 (2004).

[8] U.S. Dep't of State, *Consular Notification and Access* 13 (2003), *available at* http://travel.state.gov/pdf/CNA_book.pdf.

them predictability, fairness, ease of commercial interactions, and stability through satisfaction of mutual expectations." *Id.* at 557.

The principle of comity favors adherence to the ICJ's interpretation of the Vienna Convention in *Avena*. The Optional Protocol designated the ICJ—a widely respected institution on which the world's leading scholars of international law have served—as a leading institution with competence to adjudicate disagreements between sovereigns about the treaty's proper scope and meaning. Optional Protocol art. 1, 21 U.S.T. at 326. Thus, the drafters of the Convention and the Optional Protocol clearly intended the ICJ to have a leading role in interpreting and applying the Convention. While that role is not exclusive—national courts may frequently have occasion to interpret and apply the Convention—ICJ decisions on the Vienna Convention quite properly have a unique force, for the ICJ represents, in effect, a court of last resort for parties that differ over the meaning of the Convention. Moreover, parties historically have invoked the ICJ's jurisdiction only in cases of surpassing importance, giving its decisions even greater weight.[9] Indeed, when the occasion demanded it, the United States turned to the ICJ to resolve the Article 36 dispute in the *Diplomatic and Consular Staff* case arising out of the seizure of the U.S. Embassy in Teheran.

3. Finally, the principle of uniform treaty interpretation, recognized in several of this Court's treaty cases, favors adherence to interpretations of treaties rendered by foreign and international courts. Thus, even though the United States has withdrawn from the Optional Protocol,

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[9] *See* Gerald P. McGinley, *Ordering a Savage Society: A Study of International Disputes and a Proposal for Achieving Their Peaceful Resolution*, 25 Harv. Int'l L.J. 43, 44-46 (1984) (sovereigns do not invoke the ICJ's jurisdiction lightly); *see also* Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 Cal. L. Rev. 1, 34-41 (2005) (compiling data on ICJ action and concluding that states rarely invoke its jurisdiction).

the ICJ's *Avena* decision, rendered while the United States was a party to that Protocol, nonetheless retains strong persuasive force—as indeed it would have even if the United States had never adhered to the Optional Protocol in the first instance. This Court has long paid special heed to treaty interpretations rendered by foreign and international courts. As this Court noted in *Breard*, "we should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such." 523 U.S. at 375. In cases involving treaty interpretation, it is commonplace for this Court to review and adhere to decisions of foreign courts interpreting the relevant provisions, even though the Court might not be bound by those decisions. *See, e.g., El Al Israel Airlines, Ltd.* v. *Tseng*, 525 U.S. 155, 175-176 (1999) (noting that decisions rendered by of courts of other signatory nations are entitled to "considerable weight"); *Air France* v. *Saks*, 470 U.S. 392, 402-403 (1985) (same).

One important reason for giving great weight to foreign and international courts' treaty interpretation is that treaty drafters are generally presumed to desire a *uniform* construction of a treaty, and so "their respective courts should strive to interpret the treaty consistently." *Olympic Airways* v. *Husain*, 540 U.S. 644, 661 (2004) (Scalia, J., dissenting). Uniformity of application and interpretation is especially important in a multilateral treaty like the Vienna Convention, which cannot be easily amended if the signatories' interpretations and applications diverge.[10] It would certainly advance the parties' expectation of uniformity for this Court to follow the ICJ's *Avena* decision. A contrary con-

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[10] Given that the policy of uniformity counsels in favor of this Court's following the lead of other countries' courts that have construed a treaty even when no supranational institution is empowered to construe the treaty—as the Court has done in its Warsaw Convention cases—it has even greater import in a case involving the Vienna Convention, where many of the parties to the treaty (including, at the time the treaty was signed, the United States) agreed to establish the ICJ as a leading expositor of the meaning of the treaty.

struction of Article 36 by this Court, by contrast, would greatly undermine the goal of uniformity and would raise the possibility that the United States was in continuing non-compliance with the Convention. *Amici* respectfully submit that, to avoid that prospect, the Court should adopt the ICJ's reading of Article 36.

C. Article 36 Of The Vienna Convention Creates Individually Enforceable Rights

The U.S. government's argument that the consular notification and access provisions of Article 36 do not create individually enforceable rights is difficult to square with the plain language of Article 36(1)(b). That provision first sets forth the requirement that detaining authorities in the receiving state inform the consulate without delay of the detention of one of its nationals (if the detained person so requests). It then requires the detaining authorities to "inform the person concerned without delay of *his rights* under this sub-paragraph." Article 36(1)(b), 21 U.S.T. at 101 (emphasis added.) The drafters of the Convention thus conceived of the consular notification and access requirements as individual rights of detained persons. *See Avena*, ¶¶ 40, 140, 153 (concluding that Article 36 creates individual rights); *see also Breard*, 523 U.S. at 376 (observing that the Convention "arguably confers on an individual the right to consular assistance following arrest"). That is hardly a surprising conclusion, for, as discussed in Section A, *supra*, consular relations by nature often involve protection of the interests of individuals.

If violations of the Vienna Convention were highly infrequent or largely a thing of the past, then there might be little cost to adopting a reading of the Convention that does not create individually enforceable rights. In fact, although the State Department has made commendable efforts to encourage local law enforcement officers to fulfill their Vienna

Convention obligations,[11] those efforts have not yielded the hoped-for results. The numerous reported cases involving allegations of Convention violations suggest that the problem persists.[12] These continued violations have substantial practical import for signatory nations and their nationals in the United States, where state criminal justice proceedings regularly involve foreign nationals. In 2000, over 5% of state prisoners, or more than 56,000 individuals, were not U.S. citizens.[13]

Given that the State Department's outreach efforts have not yielded demonstrable improvement in state compliance, experience teaches that Article 36 will have its intended effect only if judicial remedies are available to individuals whose rights under the Convention have been violated. Local law enforcement authorities, unfortunately, have little incentive to ensure that those rights are scrupulously respected, and may well view the involvement of the consulate as a nuisance. And while the federal government must deal on an ongoing basis with the disappointment of foreign sovereigns whose nationals have not been informed

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[11] In 1998, the State Department issued guidelines to encourage local law enforcement officials to fulfill their Vienna Convention obligations. *See Consular Notification and Access*, *supra* n.8.

[12] *See, e.g.*, *Ramirez* v. *State*, 619 S.E.2d 668, 673 (Ga. 2005); *Sorto* v. *State*, 173 S.W.3d 469 (Tex. Crim. App. 2005), *State* v. *Byron*, 683 N.W.2d 317, 323 (Minn. Ct. App. 2004), *United States* v. *Gonzales*, 339 F.3d 725, 729 (8th Cir. 2003); *United States* v. *Cazares*, 60 Fed. Appx. 223, 226 (10th Cir. 2003) (unpublished); *United States* v. *Guerrero*, 45 Fed. Appx. 265, 266 (4th Cir. 2002) (unpublished); *United States* v. *Ortiz*, 315 F.3d 873, 881 (8th Cir. 2002); *United States* v. *Gamez*, 301 F.3d 1138, 1144 (9th Cir. 2002); *United States* v. *Contreras-Cortez*, 41 Fed. Appx. 252, 255 (10th Cir. 2002) (unpublished); *United States* v. *Emuegbunam*, 268 F.3d 377, 387 (6th Cir. 2001); *United States* v. *Felix-Felix*, 275 F.3d 627, 632 (7th Cir. 2001); *United States* v. *Minjares-Alvarez*, 264 F.3d 980, 983 (10th Cir. 2001); *United States* v. *Beckford*, Nos. 97-4924 et al., 2000 U.S. App. LEXIS 6752, at *40 (4th Cir. Jan. 28, 2000) (unpublished).

[13] *See* U.S. Dep't of Justice, Bureau of Justice Statistics, Census of State and Federal Correctional Facilities, 2000, at vi, 8 & tbl. 14, *available at* http://www.ojp.usdoj.gov/bjs/abstract/csfcf00.htm.

of their rights to contact the consular post, the State Department and the Justice Department cannot intervene directly in state criminal prosecutions or sanction local law enforcement officials who decline to observe the Convention's requirements. Only a judicial remedy, therefore, will ensure that detained foreign nationals are promptly informed of their right to contact the consulate—as the Convention unambiguously requires.

Law enforcement officials are no doubt concerned that judicial enforcement of individual rights under the Convention will diminish the prospects for convictions on criminal charges. But *amici* ask the Court to do nothing more than ensure that the Convention's requirements are observed. The Convention exists precisely because its drafters recognized that special concerns arise when a national of one state faces serious criminal charges in the courts of another state. This is as true abroad as it is in the United States. An American citizen detained overseas, especially in an unfamiliar setting, would want reassurance about the nature of the proceedings against him, and the United States government would want to be certain that those proceedings would not result in an unwarranted conviction because the American citizen did not understand that he could ask his consulate for help. So too, the United States' judicial system should ensure that a foreign national, who may speak little or no English and who may be unfamiliar with the American criminal justice system, receives the full measure of assistance available to him. Individual enforcement of the rights secured under Article 36 is necessary to ensure that those rights are consistently honored.

D. The Rights Afforded Under Article 36 Are Not Subject To State Procedural Default Rules

A central question in the *Bustillo* case is whether a defendant should be precluded from challenging his conviction on the ground that his Vienna Convention rights were violated if he did not raise that issue at or before trial. The Virginia courts, applying the state law of procedural default, declined to entertain Bustillo's Vienna Convention claim on

the ground that Bustillo had defaulted on that claim. *Amici* respectfully submit that state procedural default rules should not bar Vienna Convention claims for two reasons: first, enforcing those rules after *Avena* would violate the reciprocity and comity principles discussed above; and second, a procedural default rule is inconsistent with the nature of the right itself.

1. In *Avena*, the ICJ ruled that the Vienna Convention bars the application of state procedural default rules that would preclude judicial review and reconsideration of a criminal conviction against an individual whose rights to consular notification and access were violated. *See Avena*, ¶¶ 112, 121. This Court should follow the ICJ's lead and hold similarly. For the reasons articulated above, the same interests in comity, reciprocity, and uniformity favor a ruling in accordance with that of the ICJ. This Court should rule in a way that gives full effect to the Vienna Convention, reflecting its status as controlling law in the United States and out of respect for the ICJ judgment and interpretation of that treaty.

Although it is certainly true that, ordinarily, even federal constitutional claims are defaulted unless raised at trial, *see Breard*, 523 U.S. at 376, rights based in multilateral treaties such as the Vienna Convention raise different considerations. The application of state procedural default rules to rights grounded in multilateral treaties would raise serious questions about the United States' compliance with international law—especially now that the ICJ has concluded that such procedural default rules may not be applied. In effect, each time that a state court refuses to entertain an otherwise meritorious Vienna Convention claim based on a procedural default rule, that court places the United States in violation of its international obligations as determined by the ICJ, above and beyond the initial violation committed when the foreign national was not informed of his rights as required by Article 36.

This Court should hesitate to approve a regime under which a state court could so readily place the United States

in violation of international law. The Court has frequently stated that international relations and the structure of the Constitution require that the federal government be able to "speak with one voice" in its dealings with other countries. *See, e.g., American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 413-414 (2003); *United States* v. *Pink*, 315 U.S. 203, 242 (1942); *see also* The Federalist No. 80, at 535-536 (J. Cooke ed. 1961) (A. Hamilton) ("[T]he peace of the WHOLE ought not to be left at the disposal of a PART").

A threat to the United States' relations with other countries can come from state courts no less than from other organs of state governments. This Court has implicitly recognized that fact in its act of state cases. "The act of state doctrine is grounded on judicial concern that *application of customary principles of law* . . . might frustrate the conduct of foreign relations by the political branches of the government." *First Nat'l City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759, 767-768 (1972) (opinion of Rehnquist, J.) (emphasis added); *see Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 423 (1964). And the Court has not hesitated to find that state courts' application of state law created a potential threat to the federal government's conduct of foreign relations, even when the administration of the day discounted that concern. *See Zschernig* v. *Miller*, 389 U.S. 429, 434 (1968); *Sabbatino*, 376 U.S. at 432-433, 436.

When foreign nations such as *amici* treat with the United States on matters of consular notification or other issues, it is imperative that they have assurances that the United States will comply with its obligations. This compliance includes the individual States and thus requires that individual state procedural default rules—rules that are not even consistent across the country—will not prevent review of claims under the Vienna Convention. This Court therefore should confirm the rule announced more than two hundred years ago in *Ware* v. *Hylton*, 3 U.S. (3 Dall.) 199, 236-237 (1796): "A treaty cannot be the supreme law of the land, that is of all the United States, if any act of a State Legislature can stand in its way," for courts are under a "declared

duty . . . to determine any Constitution, or laws of any State, contrary to [a treaty] made under the authority of the United States, null and void."

2. State procedural default rules also are inconsistent with the very nature of the rights to consular notification and access. The basis of any claim under Article 36 is that the defendant was not notified of certain rights, as the Convention requires. The reason why the drafters of the Convention required detaining authorities to inform detained individuals of their rights to consular notification and access is that, in all likelihood, such individuals would not know that they had such rights.

It is not an answer to suggest that the defendant's lawyer could have raised any Vienna Convention claim on his behalf at or before trial, and that the lawyer's failure to do so is binding on the defendant. This argument is unpersuasive for at least three reasons.

First, one of the central purposes of the Vienna Convention right is to ensure that consular assistance can help the defendant secure culturally sensitive counsel. Lawyers who are not accustomed to representing foreign nationals may well not understand how the consulate could assist their clients.

Second, this argument assumes that the lawyer should have been aware of the right to contact the consulate under the Vienna Convention. But many lawyers may not be aware of the Vienna Convention's existence or of the possibility that consular assistance is available.

Third, the lawyer's failure to preserve a Vienna Convention claim should not constitute a default because Article 36 rights are personal to the individual. To be sure, the United States' legal system does generally recognize that "the lawyer has—and must have—full authority to manage the conduct of the trial." *See, e.g., Taylor* v. *Illinois*, 484 U.S. 400, 417-418 (1988). But the U.S. criminal justice system also recognizes exceptions to that rule; for example, a lawyer ordinarily may not waive "basic rights," *see id.*, such as the defendant's right to counsel or the right to trial by

jury. *See, e.g., Patterson* v. *Illinois*, 487 U.S. 285, 298 (1988). In those circumstances, the defendant must be specifically and personally advised of his rights, and a "waiver" of those rights without a record that the defendant was made aware of them will not be deemed knowing and voluntary. *See, e.g., Taylor*, 484 U.S. at 418 (requiring "the fully informed and publicly acknowledged consent of the client").

The rights to consular notification and access are of similar dimension. Article 36 requires that notification of the right to consular access be made *to the detained individual*, not to the individual's agent or attorney. Whether to contact the consulate for assistance is a decision for the detained individual to make. Indeed, it would be particularly inappropriate to put the defendant's lawyer in control of that decision. As discussed above, one of the purposes of Article 36 is to ensure that the consulate can assist its detained nationals in finding counsel who apprehends the unique difficulties of representing someone who is not familiar with the U.S. criminal justice system and who can communicate with both the defendant and the consulate about possible lines of investigation.

Finally, Vienna Convention claims should not be subject to procedural default because in many cases it may be impossible to ascertain whether such a claim would be available until after trial. In this regard, Vienna Convention claims are analogous to claims of ineffective assistance of counsel, which, the Court has recognized, present an exception to the rule that claims not raised on direct review may not be raised on collateral review. *See Massaro* v. *United States*, 538 U.S. 500, 504-505 (2003). The Court concluded that "requiring a criminal defendant to bring ineffective-assistance-of-counsel claims on direct appeal does not promote the[] objectives" of conserving judicial resources and respecting final judgments. *Id.* at 504. "When an ineffective-assistance claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this

purpose." *Id.* at 504-505. Absent factual development, "an appellate court may not be able to ascertain whether the alleged error was prejudicial." *Id* at 505.

The same logic applies to many claims of Vienna Convention violations. In cases where the individual was not made aware of his Vienna Convention rights until after the trial, the impact of the violation may not be apparent from the trial record. Indeed, in many Vienna Convention cases, the central issue will be what is *missing* from the trial record—what facts might have been developed, or what decisions might not have been made, had the consulate been able to intercede. A habeas court would be able to consider such additional facts relevant to assessing the prejudicial effects of the treaty violation. State procedural default rules thus have no place in the analysis of Vienna Convention claims.

E. *Breard* Should Not Be Followed In These Cases

Of the three principal questions presented in these cases—whether Article 36 creates individual rights, whether a suppression remedy is available for violations of those rights, and whether those rights are subject to state procedural default rules—only one, the procedural default issue, was addressed by this Court in its per curiam opinion accompanying the denial of certiorari in *Breard* v. *Greene*, 523 U.S. 371 (1998). *Breard* therefore presents no obstacle to a conclusion by this Court that Article 36 creates individual rights or that a suppression remedy may be available for a violation of those rights.[14]

As to the issue of procedural default, this Court should look past *Breard* because of a fundamental change in the legal landscape in the intervening years: the ICJ's ruling on Article 36. In *Breard*, the Court found it "unfortunate" that no "international court" possessing "jurisdiction to interpret" the Vienna Convention had rendered any relevant in-

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[14] In *Breard*, the Court assumed that Article 36 created individual rights. *See* 523 U.S. at 376 ("The Vienna Convention . . . arguably confers on an individual the right to consular assistance following arrest.").

terpretation. 523 U.S. at 375, 378. The Court recognized that if such a decision had been rendered, this Court "should give [it] respectful consideration." *Id.* at 375. In the absence of such prior interpretation, however, the Court noted the provision of the Vienna Convention declaring that the rights enforced by the treaty should be "exercised in conformity with the laws . . . of the receiving state," Vienna Convention, art. 36(2), 21 U.S.T. at 101, and held that this language indicated that state procedural default rules would still be applied. 523 U.S. at 375-376. In the present case, unlike in *Breard*, not only has the ICJ spoken, it has done so after two lengthy and thorough adjudications to which the United States was a party. The "respectful consideration," *id.* at 375, due to the ICJ's interpretation is now a compelling factor, and the *Breard* denial of certiorari should bear much less weight.[15]

Although reaching this conclusion may require departing from *Breard's* statements regarding procedural default, those statements should not be followed here. First, the Court's statement that "Breard procedurally defaulted his claim, if any, under the Vienna Convention," 523 U.S. at 375, was unnecessary to the Court's disposition of that case, since the Court *also* stated that Breard's failure to establish prejudice from any violation of the Vienna Convention was fatal to his claim, *id* at 377.[16] Second, the opinion in *Breard*

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[15] This Court has previously been willing to revise its interpretation of a treaty when additional information bearing on the proper interpretation was brought to its attention. *See United States* v. *Percheman*, 32 U.S. (7 Pet.) 51, 88-89 (1833).

[16] Indeed, it is not clear that any aspect of *Breard* rests squarely on a ruling about procedural default. In *Breard*, after discussing procedural default generally, the Court stated that Breard was precluded from relief by a federal statute, the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"). *See Breard*, 523 U.S. at 376-377. This Court concluded that AEDPA "prevent[ed] Breard from establishing that the violation of his Vienna Convention rights prejudiced him," and that "Breard's ability to obtain relief based on violations of the Vienna Convention" was subject to AEDPA because AEDPA was a "subsequently enacted rule." *Id.* at 376. Bustillo's case, however,

accompanied a denial of certiorari, not a decision on the merits after full briefing and argument. While that opinion was more elaborate than the typical order denying certiorari or summarily affirming a lower court decision, the Court has made clear that it has "felt less constrained to follow precedent where, as here, the opinion was rendered without full briefing or argument." *Hohn* v. *United States*, 524 U.S. 236, 251 (1998). Third, the *Breard per curiam* opinion was rendered under especially exigent circumstances, *see Breard*, 523 U.S. at 379-380 (Stevens, J., dissenting), which further counsels against its precedential value.

F. The Importance Of The Right To Consular Notification Is Convincingly Demonstrated In These Cases

Each of these cases forcefully shows the value of consular notification and the potentially grave consequences when the requirement of notification is not observed.

1. Virginia's failure to notify Bustillo of his right to contact the Honduran consulate resulted in Bustillo's failure to obtain critical exculpatory evidence. The theory of the defense at trial was that another person, known as "Sirena") (now known to be Julio Osorto) a Honduran citizen like Bustillo, had in fact been the one to kill the victim by striking him with a baseball bat. The entire case came down to the testimony of five witnesses, three testifying that Bustillo was the killer and two saying that he was not (one of whom identified Sirena as the killer). A defense witness testified that Sirena had fled the U.S. for Honduras shortly after the crime. At the time of trial, the defense was unable to locate or properly identify Sirena.

Since the trial, with the help of the Honduran consulate, Sirena's name has been established, his flight to Honduras (including details specified by the defense witness) con-

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has been brought pursuant to Virginia's *habeas corpus* law, not AEDPA, and so the provisions of AEDPA that might otherwise preclude relief are inapplicable.

firmed, and a videotaped confession of Sirena admitting to striking the victim with a baseball bat has been obtained. Furthermore, police reports reflect that police stopped Sirena near the crime scene, that he falsely told police that he had not been at the crime scene, that Sirena had red stains on his clothes at the time, and that another witness saw Sirena cock a bat to strike the victim. The Honduran consulate has submitted a declaration stating that if it had been aware of Bustillo's case before trial—including the fact that the defense believed another Honduran national had committed the crime—it could have provided valuable assistance to Bustillo. Specifically, it could have supplied immigration records confirming Sirena's flight to Honduras, a photograph of Sirena, and it could have attempted to contact and interview Sirena about the events. Habeas Pet. Exs. 26, 26a, 26b. The ample prejudice to Bustillo that resulted from the Virginia authorities' failure to notify him of his right to contact the consulate is therefore plain: the Honduran consular officials could have obtained evidence that would have crucially bolstered the defense's theory of the case and drastically undercut the prosecution's tactic of mocking Bustillo's theory of the case.

2. The case of Sanchez-Llamas likewise offers a lesson in the importance of the protections offered under the Vienna Convention. Following his arrest and *Miranda* warnings, but absent notification of his rights under the Vienna Convention, Sanchez-Llamas made inculpatory statements to the police. Sanchez-Llamas's confession was then used to convict him.

American citizens are, of course, generally familiar with *Miranda* warnings and their consequences. Indeed, "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture." *Dickerson* v. *United States*, 530 U.S. 428, 443 (2000). A foreign national, however, may well lack this familiarity both with the content of the *Miranda* warnings and their effects in practice; a foreign national also may not apprehend the role of appointed counsel or the fact that a

statement to the police outside the presence of a magistrate or public prosecutor may be admissible at trial. Absent consular notification, Sanchez-Llamas was denied the opportunity to receive consular assistance that could have helped him understand that in the U.S., confessions (regardless of their accuracy) are not necessarily the fastest way out of trouble, as they may be in some countries. Had Sanchez-Llamas been offered consular notification, secured such assistance, and better understood the legal system, he might not have provided a confession, the reliability of which is challenged here.

Each of these cases demonstrates the peril that foreign nationals may face when they encounter an unfamiliar criminal justice system, and each demonstrates why consular assistance is so important in such situations. Because of the authorities' failure to observe Article 36, Bustillo was never apprised of a means by which he could secure crucial exculpatory evidence, and Sanchez-Llamas made inculpatory statements that may well not be reliable. Were a U.S. citizen detained abroad to be placed in such a situation, the United States would have good cause to be troubled by the violation of its national's rights. The same is no less true when the rights of *amici*'s citizens are violated here.

CONCLUSION

The judgments of the Supreme Court of Oregon and the Supreme Court of Virginia in these cases should be reversed.

Respectfully submitted.

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